No. 80-1550

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IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

PAUL E. TINSLEY, JR.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, United Parcel Service, Inc. (UPS), files this supplemental brief under Rule 22.6 of the Supreme Court Rules to address the relevance of this Court's recent decision in **Clayton v. United Auto Workers and ITT Gilfillan,** 49 U. S. L. W. 4550 (May 26, 1981) (Nos. 80-54 and 80-5049) to the instant petition for a writ of certiorari.

In **Clayton,** this Court ruled that the failure of an employee to exhaust internal union remedies does not bar his Section 301 action against either his employer or his labor union, unless those remedies can result in either complete relief to the employee or reactivation of his grievance.

The petition for a writ of certiorari in the instant case seeks review and reversal of a decision of the Court of Appeals for the Seventh Circuit which had affirmed the dismissal of the plaintiff's complaint against the Union, but had reversed the dismissal of the complaint against UPS, where the plaintiff had failed to exhaust internal union remedies. It was UPS's position that it is anomalous, illogical and highly prejudicial to an employer to permit this initially joint Section 301 action against union and employer to proceed against employer alone, particularly where (as here) proof that the union had breached its duty of fair representation was essential to a finding of employer liability. Because the issue raised by UPS was identical to the issue raised by ITT Gilfillan in its petition for a writ of certiorari in **Clayton** (No. 80-54), UPS suggested to this Court that its petiiton should be decided along with the appeal in **Clayton.**

Contrary to UPS's earlier expectation, however, the mechanical application of this Court's decision in **Clayton** does not provide an answer to the question posed in the instant case. The final and crucial question presented in

both the employer's petition in **Clayton** and UPS's petition here was whether "an employee who chooses not to exhaust internal union procedures [may] proceed solely against the Company and require the Company to present the Union's defense to the alleged breach of the duty of fair representation." In **Clayton**, the employee cross-petitioned for certiorari, and the Court granted both petitions. By contrast, in the instant case, the employee in this case has abandoned his effort to obtain redress from the union whose breach of the duty of fair representation he claims permits him to bring this action and is proceeding only against petitioner UPS. As a result, UPS will be forced to defend not only its own conduct, but the conduct of a third party, the Union, which has been dismissed from the case.

Because both union and employer were before it in **Clayton**, the Court was able to prevent the anomalous result of the employer alone having to defend the union's representation of the employee by holding that neither the employer nor the union can require the employee to exhaust internal union remedies which cannot give full relief or reinstate the grievance. However, this answer is not available here because the employee has abandoned his effort to pursue his action against the union. Equally important, UPS does not even have the opportunity to bring the union into this action as an additional defendant as it could have done had Tinsley sued UPS alone in the first instance. Here the unchallenged final decision of the court of appeals dismissing the action against the union, however wrong it may be under this Court's **Clayton** decision, remains the law of the case and cannot be challenged now by UPS or Tinsley.

Yet the one point on which all nine members of the Court were in complete agreement in **Clayton** was that the employee's claim against the employer should not be

separated from his threshhold claim against the union for breach of the duty of fair representation. Thus, one of the key reasons the majority refused to permit a section 301 action to proceed against an employer while the plaintiff exhausts his remedies against the union was that this course could lead to two separate lawsuits and trials over the same set of facts, "a result that should be avoided if at all possible." 49 U. S. L. W. at 4555. Justice Rehnquist's dissent, which was joined by three other Justices, stated: "The Court's opinion today rights what I view as the principal error in the decision below by requiring the actions against the employer and union to proceed simultaneously." *Id.*

Nevertheless, due to the procedural posture of this case, the decision of the court of appeals, unless vacated by this Court, will permit Tinsley's suit to proceed solely against UPS. For the reasons set forth in UPS's petition for a writ of certiorari, that result would be illogical and fundamentally unfair to UPS, as well as contrary to the observation of this Court in **Vaca v. Sipes**, 386 U. S. 171, 187 (1967), that it makes no sense to "fashion a remedy only with respect to the employer" when the fault of the union must and will be litigated in connection with the plaintiff's claim against the employer.

For the foregoing reasons, as well as for the reasons set forth in the petition, this Court should grant UPS's petition for a writ of certiorari.

Respectfully submitted,

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